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Monterey Gourmet Foods, Inc.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

MONTEREY GOURMET FOODS,
INC., a Delaware corporation,

Plaintiff,

vs.

WINDSOR QUALITY FOOD
COMPANY LTD., a Texas Limited
Partnership; and DOES 1 through 20,
inclusive,

Defendants.

No. C08-01316 (JCS)

Case assigned for all purposes to
Hon. Joseph C. Spero

**NOTICE OF MOTION AND SPECIAL
MOTION OF COUNTERDEFENDANT
MONTEREY GOURMET FOODS, INC.'S
TO STRIKE COUNTERCLAIM OF
WINDSOR QUALITY FOOD COMPANY,
LTD. [Cal. Code of Civ. Pro. § 425.16]**

Date: June 6, 2008
Time: 9:30 a.m.
Courtroom A (Hon. Joseph C. Spero)
Trial Date: Not Set

Accompanying Papers: Memorandum of
Points & Authorities; Request for Judicial
Notice; Proposed Order; Companion
Motion to Dismiss

AND RELATED COUNTERCLAIM.

NOTICE OF SPECIAL MOTION TO STRIKE COUNTERCLAIM

TO ALL PARTIES AND TO THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on June 6, 2008, at 9:30 a.m., or as soon thereafter
as the matter may be heard in the United States District Court for the Northern District of
California, Courtroom A, 15th Floor, 450 Golden Gate Avenue, San Francisco, California,

1 Plaintiff and Counterdefendant Monterey Gourmet Foods, Inc. ("MGF") will and hereby
 2 does make a Special Motion to Strike the Counterclaim of Defendant and
 3 Counterclaimant Windsor Quality Food Company Ltd. ("Windsor"), pursuant to Section
 4 425.16 of the California Code of Civil Procedure. This hearing date is mandated by the
 5 docket conditions of this Court, which require hearing "not less than 35 days after service
 6 of the motion" (Civ. L.R. 7-2).

7 Said motion is made and based on the grounds that Windsor' Counterclaim
 8 constitutes a claim that is a Strategic Lawsuit Against Public Participation ("SLAPP")
 9 because it sues Counterdefendant MGF for exercising its rights of petition and free
 10 speech in registering Trademarks before the United States Patent and Trademark Office
 11 ("USPTO"), and because Counterclaimant cannot establish a probability that it will
 12 prevail on its Counterclaim based upon alleged fraud. MGF seeks issuance of an Order
 13 striking the Counterclaim, in accordance with Section 425.16 of the California Code of
 14 Civil Procedure, as well as an Order awarding reasonable attorney's fees and costs
 15 pursuant to Subpart (c) of said Section. This motion is made and based upon 1) this
 16 Notice of Motion; 2) the accompanying Memorandum of Points and Authorities; 3) MGF's
 17 accompanying Request for Judicial Notice; and 4) such other pleadings, papers and
 18 records on file in this action, and on such argument and evidence as may be presented
 19 to the Court in connection with this motion.

20 A copy of MGF's proposed Order is attached hereto.

21 Dated: May 1, 2008

22 Respectfully Submitted,

23 SHAPIRO BUCHMAN PROVINE & PATTON, LLP

24
 25 By: 

26 John H. Patton, Cal. SBN 069261
 27 Attorneys for Plaintiff and Counterdefendant
 28 Monterey Gourmet Foods, Inc.

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Proposed

**ORDER GRANTING SPECIAL MOTION
OF COUNTERDEFENDANT MONTEREY
GOURMET FOODS, INC.'S TO STRIKE
COUNTERCLAIM OF WINDSOR
QUALITY FOOD COMPANY, LTD.
[Cal. Code of Civ. Pro. § 425.16]**

Date: June 6, 2008

Time: 9:30 a.m.

Courtroom A (Hon. Joseph C. Spero)

Trial Date: Not Set

AND RELATED COUNTERCLAIM.

ORDER GRANTING SPECIAL MOTION TO STRIKE COUNTERCLAIM

The special motion of Plaintiff and Counterdefendant Monterey Gourmet Foods, Inc. ("MGF") to strike the counterclaim of Defendant and Counterclaimant Windsor Quality Food Company Ltd. ("Windsor") came on regularly for hearing pursuant to notice on June 6, 2008, in Courtroom A of the United States District Court for the Northern

1 District of California, the Honorable Joseph C. Spero presiding. Plaintiff,
2 counterdefendant and moving party appeared by its counsel of record; defendant,
3 counterclaimant and opposing party Windsor appeared by its counsel of record.

4 The Court having read and considered the pleadings, papers and arguments
5 submitted in support of and in opposition to the motion, and good cause appearing
6 therefore, now, therefore,

7 **IT IS HEREBY ORDERED THAT THE MOTION IS GRANTED, AS FOLLOWS:**

8 1. Pursuant to Section 425.16 of the California Code of Civil Procedure, the
9 Court determines that Windsor's counterclaim arises out of acts and conduct in
10 furtherance of counterdefendant MGF's constitutional rights of freedom of speech and/or
11 to petition, and is therefore subject to the provisions of Section 425.16.

12 2. The Court further finds that counterclaimant Windsor has not established a
13 probability that it will prevail on its counterclaim for alleged fraud on the United States
14 Patent & Trademark Office.

15 3. Therefore, the counterclaim is hereby ordered stricken.

16 4. Counterdefendant MGF may seek recovery of its fees and costs by
17 separate noticed motion pursuant to Section 425.16(c) of the California Code of Civil
18 Procedure.

19 Dated: _____
20
21

22 _____
23 Joseph C. Spero
24 UNITED STATES MAGISTRATE JUDGE
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